No. 288.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN AND TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

HON C. H. HANFORD, Judge.

BRIEF OF APPELLANT.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors for Appellant.

HERBERT B. TURNER, *Of Counsel.*

SEATTLE

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STATEMENT OF FACTS.

A general mortgage foreclosure suit,—The Farmers' Loan and Trust Company against the Northern Pacific Railroad Company and others,—was, during the month of October, 1893, instituted in the several Circuit Courts of the United States for the Districts within which prop-

erty of the mortgagor company is situated, and receivers were appointed to take possession of and operate the properties during the pendency of said suit.

On October 30th, 1893, an order was made in the Circuit Court for the District of Washington, Northern Division, whereby all of the properties of the Railroad Company and income derivable therefrom were sequestered under this foreclosure suit, the receivers immediately taking possession, and having since operated the road under the order of their appointment.

In the month of August, 1894, petitioners intervened in the foreclosure suit by filing their joint petitions, in which they set up their respective judgments against the Northern Pacific Railroad Company, being in the same court, giving the amounts and dates of their judgments, and referring to the records of the court for the history of their respective suits. It was claimed that all the suits were pending prior to the appointment of the receivers, and that the latter had ignored their demands for payment. (Transcript, pp. 2 and 3.)

The prayer of the petition was granted by the court making an order, on August 16th, 1894, that within thirty days after the date of its order, the receiver make payment of said judgments in cash or deposit with the clerk of the court receiver's certificates for the amount of said claims. (Transcript, p. 5.)

No notice of this proceeding was given The Farmers' Loan and Trust Company, and it was without any knowledge of the same until after the order had been entered. (Transcript, pp. 6 and 8.)

Upon the application of The Farmers' Loan and Trust

Company, the court suspended the execution of the order directing payment of the judgments, and gave The Farmers' Loan and Trust Company leave to show cause why this order of preference should be set aside.

Upon motion of the petitioners, this application to show cause was brought on for hearing. Hearing was had upon the record of the cause, and after having been taken under advisement, an order was entered December 18th, 1895, denying the motion to vacate the original order directing the payment of the judgments, and modifying that order so that the receiver was directed on or before the 31st day of December, 1895, to pay the respective judgments with costs, but without interest, in cash. (Transcript, pp. 12 and 13.)

In order to save a voluminous record, and at the same time present for review in this court the same matter that was passed upon by the lower court, Judge Hanford permitted the filing of a *nunc pro tunc* answer of October 10th, 1894, upon the part of The Farmers' Loan and Trust Company. (Transcript, pp. 14 and 15.) This answer is found at p. 16 of the transcript. It summarizes the Bill of Complaint in the foreclosure suit of The Farmers' Loan and Trust Company against the Northern Pacific Railroad Company *et al.*, by setting forth the incorporation of the Railroad Company, and the scope of its grants and franchises under the Act of Congress of July 2nd, 1864, and the subsequent acts of Congress, as well as the legislation of the several states, and that by virtue thereof the Railroad Company had become seized and possessed of large quantities of land and an extensive mileage of railroads, with their equipments, appurtenances, rolling stock and other properties, all of

which were embraced in and subject to the liens of the mortgages set forth in the answer. This answer fully set forth the several mortgages for the foreclosure of which the action was brought, and described the property embraced within these mortgages as constituting all and singular the main and branch railroads and telegraph lines of the Northern Pacific Railroad Company, all its lands, tenements and hereditaments acquired or appropriated, or thereafter to be acquired or appropriated, for any purpose connected with its main or branch lines of road; and, in short, everything pertaining to or incident to these lines of railroad or telegraph or designed to be used or enjoyed in connection with them, and all the rolling stock, equipments, privileges, immunities and franchises connected with or in any wise relating to the lines of railroad or telegraph then or thereafter to be acquired; all corporate franchises, and generally all other property or rights of property of every kind and nature then or thereafter to be acquired and wheresoever situated, together with all the income, earnings and profits of all of such properties; and that the same were an inadequate security for the payment of the indebtedness for which they were given. And it was alleged that each of the mortgages was the proper act of the corporation, that each was made in conformity to law, and that each was duly recorded in the office of the Secretary of the Interior.

The answer further set forth the default of the Railroad Company in making payment of interest upon its bonded indebtedness secured by the mortgages, its insolvency, the commencement of the action for the foreclosure, the appointment of the receivers in the fore-

closure suit, the sequestration of the property and income, the possession of all such properties with the income by the receivers, and their operation of the road. The answer also admits the judgments of the petitioners in the amounts alleged and as set forth in the journal of the court. It gives the history of each of these judgments as shown by the record as follows:

In the case of Peter G. Longworth, action was commenced against the Northern Pacific Railroad Company June 19th, 1891, for personal injuries resulting to him as a passenger through negligence on the part of the agents of the Railroad Company. Verdict was rendered October 16th, 1893, and judgment rendered thereon October 30th, 1893, for three thousand dollars and costs.

The case of Richard A. Bellinger was an action for breach of a contract made by him with the Northern Pacific Railroad Company in settlement of a claim for personal injuries received by him through the carelessness of the Railroad Company, while in its employ, January 16, 1888. The judgment was recovered October 24, 1893, for the sum of fifteen hundred dollars and costs.

While the case of Michael Raskey and wife was for personal injuries inflicted on their minor child by being carelessly run over by the Railroad Company's train on October 17, 1892. The action was commenced April 1, 1893, and judgment rendered thereafter for five hundred dollars and costs. (Transcript, p. 27, paragraphs 20, 21 and 22.)

ERROR.

The error relied upon is, the order of the Court making the foregoing claims a preferential lien upon the trust fund in the custody of the receiver.

ARGUMENT.

It will be observed from the foregoing statement, that the Northern Pacific Railroad Company, and all its properties, went into the hands of the receivers, under the mortgage foreclosure suit, on October 30, 1893, and that all the income of its properties thereafter became a trust fund in the custody of the court to be applied to the payment of the mortgage indebtedness; that all three of the claims set forth in the petition are based upon personal injuries occurring through the negligent operation of the railroad, the first being an injury to a passenger occurring some time prior to June 19, 1891, more than two years before the appointment of the receiver; the second, that of an employee of the Railroad Company, injured through its carelessness nearly six years before the appointment of the receiver, and whose cause of action is based upon a contract made in settlement for this personal injury claim; and the third being that of a personal injury caused to a child by the negligent running of a train more than a year prior to the appointment of the receiver. The record shows that all of the property of the Northern Pacific Railroad Company is covered by the mortgages of that company to The Farmers' Loan and Trust Company to secure the payment of its bonded indebtedness, and that

these mortgages were existing liens upon the property of the Railroad Company at the time the several injuries occurred, and that the income of the road had been sequestered before any levy or other lien had attached to it.

The question is, therefore, clearly presented whether claims arising from personal injuries caused by the careless operation of a railroad, at any time within the statute of limitations, prior to the road going into the hands of a receiver, take precedence over the mortgage lien upon the trust fund. A reference to the order and opinion of the court will show that the presiding judge met this question directly, and held the personal injury claim to be a lien superior to that of the mortgage upon the trust property in the custody of the court.

The order allowing the filing of the answer of The Farmers' Loan and Trust Company to the petition (Transcript, p. 14), recites: "* * * To the end that the issues argued by counsel, and upon which said matter was heard and determined by the court, may fully appear in the pleadings and record of this matter, viz, as to whether the respective claims of said petitioners are operating expenses of said Northern Pacific Railroad Company of such a character as to have precedence over and be a superior lien upon the income of the said Northern Pacific Railroad Company, in the hands of its receivers, over the lien of the mortgages of said Northern Pacific Railroad Company to The Farmers' Loan and Trust Company, as trustee." * * *

Thus it is seen that the trial court met the proposition squarely as to whether a judgment against a railroad company for personal injuries arising through

the carelessness of its operatives prior to the appointment of a receiver is a liability entitled to preference over the lien of a prior recorded mortgage upon the income and property of the corporation, and sought to afford and facilitate a review of his judgment upon that question in this court.

That such a claim is in no sense preferential, and that it can be regarded in no more favorable light than that of a general credit, may safely be submitted on the adjudicated cases in the federal courts.

In Davenport v. Receivers Alabama & Chat. R. R. Co., 2 Wood's (U. S.) Reports, p. 519, a passenger who had sustained damages while traveling upon a road in the hands of a receiver, obtained judgment for personal injuries resulting from the carelessness of those operating the road, and petitioned to have the amount of the judgment allowed out of the trust fund. Woods, Circuit Judge, in denying the claim, said:

"The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts." Page 523.

In *In re* Dexterville Manufacturing & Boom Co., 4 Fed., 873, claims were presented, to be allowed as preferential, for damages to timber and cranberry marshes occasioned by fire negligently permitted to escape from the engines of a railroad company before it went into the hands of a receiver. Dyer, D. J., in denying them, said:

"The road was still being operated by the company, nd whatever liability existed must have been one

against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the courts sometimes order paid from net earnings, in the hands of a receiver, as having equities superior to those of bondholders. If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly urged were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying, an otherwise valuable security."

In Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 28 Fed., 871, a shipper intervened in a foreclosure suit, and prayed that payment of damages, resulting to him from the failure of the railroad, shortly before going into the control of the receiver, to transport certain cars of grain, be allowed out of the rents and profits in the hands of the receiver. Treat, J., in passing upon this claim, said:

"The effect of this is that the amount for which the Wabash Company should have responded in 1881 is allowable against the Wabash Corporation, as a corporation, and not against the receivers, or the funds in their hands earned since their appointment, to be made prior in right to the mortgages."

In Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed., 664, the administratrix of a deceased conductor, by petition, showed that in April,

prior to the appointment of the receiver in August, the conductor, while in the discharge of his duty, had lost his life by virtue of the carelessness of the railroad company, and sought to have the amount of the claim for the injury made a charge upon the income and *corpus* of the property superior to the lien of the mortgage. Jenkins, J., in denying the claim, said:

"The loss of life occurred in the operation of the road, but arose from a failure of duty. It happened in the performance of the contract, but not because of performance. Its promoting cause was the default of the company, not the labor performed. The resulting death was a detriment, not an aid, to the road. It was in no possible sense of advantage to the mortgage interest."

In Central Trust Co. v. East Tennessee &c R. R. Co., 30 Fed., 895, Pardee, J., in passing upon such a claim, says:

"The petitioner's claim against the railroad company is for personal injuries growing out of the negligence of the company's agents more than four years prior to the suit for foreclosure. Neither on principle nor authority can we adjudge such a claim to be prior in right to the mortgage bondholders."

In Farmers' Loan & Trust Co. v. Detroit &c R. R. Co., 71 Fed., 29, a receiver was appointed in October, 1893. In 1891, while the railroad company was still operating the road, a passenger on a train was injured by reason of the carelessness of the operatives. A judgment for ten thousand dollars was recovered which it was attempted to have declared a lien upon the trust fund in the hands of the receiver superior to that of the mortgage. Swan, District Judge, in denying the claim, said:

"Petitioner's judgment for personal injuries does not entitle him to rank as a secured creditor of the railroad company, nor has a court of equity power to displace the vested right of the bondholder in favor of such a claim."

Perhaps the most exhaustive case upon this subject is that of St. Louis Trust Co. v. Riley, 70 Fed., 32. Judgment for several thousand dollars was recovered in an action for personal injuries occurring five months before the street railway went into the hands of a receiver. After a review of many cases, Sanborn, Circuit Judge, expressed the views of the Circuit Court of Appeals as follows:

"But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for material and supplies accrue under and pursuant to the contract between the mortgagor and the mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued, would inevitably stop it. It was not necessary, but was deleterious, to its opera-

tion. For these reasons this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages."

Most of these rejected claims were presented upon rules claimed to have been laid down in decisions of the Supreme Court, particularly in the cases of Fosdick v. Schall, 99 U. S., 235, Miltenberger v. Logansport Ry. Co., 106 U. S., 286, and Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S., 434, which were cited by the Judge of the lower court as laying down the rules governing his decision in the case at bar. We respectfully submit that nothing in the facts of either of these cases, nor in the principles laid down in them, nor in their subsequent application by the Supreme Court of the United States, will warrant the construction claimed. Detached statements taken from these opinions have been invoked to establish rules which the cases in themselves would not warrant, and which the learned justices in subsequent opinions have taken pains to show were not intended and were not sanctioned by the court. Perhaps no case has been resorted to so often as that of Fosdick v. Schall, *supra*, for the purpose of displacing the vested rights of railroad mortgagees and impairing the obligation of contracts. A critical examination of that case cannot warrant the conclusion so frequently sought to be drawn from it—that the mortgagee of a railroad company stands upon ground but little, if any, better than that of a general creditor.

Two questions were determined in that case. First, that by a conditional sale of rolling stock made to a

railroad company and its receiver in the form of a lease, in which payments were to be made of an amount equaling the agreed purchase price, title to the cars did not pass from the seller until the price was paid. Second, that an order of the court directing a receiver out of the trust funds to pay the seller rental for his cars for the time they were used in operating the road prior to the receivership was invalid against the bondholders and that the vendor was simply a general creditor with no equitable claim on the fund. The facts as found were that Schall, the manufacturer of cars, had in the form of a lease conditionally sold a large number of cars to be used in operating a railroad, and of which, when certain installments equaling the price of the cars should be paid, the railroad company should become the owner. For nearly two years the cars were used on the road, and partial payments were made under the contract, when a receiver, at the instance of a creditor, was appointed in a state court, who continued using these cars in the operation of the road. After the cause had been removed to the federal court, the use of the cars still continued, and up to and until after the appointment in the federal court of a receiver in the action of Fosdick, Trustee, to foreclose the mortgage. The receiver in the foreclosure suit, finding the cars were essential to the operation of the road, arranged a valuation with Schall and agreed in the form of rent to make monthly payments until the agreed price should be paid. The road was sold under foreclosure, and Schall petitioned to have his cars returned and rental for their use as a necessary part of the operation of the road during the six months prior and following the receivership in the state

court decreed a preferential claim. It was held by the Circuit Court he was entitled to a return of his cars and an equitable claim upon the fund superior to that of the mortgage for their use during the time stated. The Supreme Court sustained his claim of ownership of the cars but overruled the lower court in holding he had a superior claim for the payment of the rental on the fund for which the railroad was sold.

If we correctly comprehend the general principles laid down in that case, aside from the two specific questions determined, they are, first, that the general and extensive character of the business of a railroad requires credit should be given to meet its current expenses, and that the mortgagee is confined to the net income after current operating expenses are paid, and if moneys that should be so paid have been diverted either to the payment of the mortgage or in building up the mortgage security, equity will compel a restoration; and the second general rule is that the appointment of a receiver in aid of a mortgage foreclosure is not a matter of right but of favor within the discretion of the Chancellor, and in granting such favor conditions may be imposed and concessions required of the mortgagee which if acquiesced in by accepting the receivership become binding upon the mortgagee. Applying the rules thus laid down to the facts in the case, the Supreme Court held that for the use of the rolling stock essential to the operation of the road for the period of time before and subsequent to the appointment of the receiver in the state court no preferential lien existed, and in denying the claim says:

"In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only." P. 255.

In the case of Miltenberger v. Logansport Railway Company, 106 U. S., 286, the railroad company gave as first mortgage security a million and a half dollars of bonds, and then a second mortgage securing five hundred thousand. In 1874, in the foreclosure of the second mortgage, a receiver was appointed, and in the order of appointment he was directed to manage and operate the road, make repairs, and pay operating arrears for the preceding ninety days. The road was without adequate rolling stock. Subsequently, orders were made to purchase stock and pay prior freight and traffic balances. The trustee of the first mortgage appeared in the suit, and upon a conference with and consent of about two-thirds of the holders of the first mortgage bonds, the receiver obtained the consent of the court to borrow about three hundred thousand dollars to pay indebtedness incurred to meet the needs of the road. In 1876, the first mortgage holders by cross-bill proceeded to a foreclosure. A decree was entered foreclosing both mortgages on identically the same property, the question of priority of claims being left for future determination. The road was operated by the receiver until 1879, and when the sale was made, a contest was had over the application of the funds. Objection was made to the preference given the claim for rolling stock and prior operating expenses, freight balances and the construction of a

short piece of road. The payment of all these claims was shown to have been indispensable to the operation of the road. It was shown that all the payments had been strictly within the orders of the court. The lease expenditures were disposed of as incurred by the consent of all parties. The court found that the claims for repairs, freight balances and supplies were made with discrimination and within the scope of its orders.

The opinion brings out the facts that the first mortgage bondholders, by their trustee, were all the while in court, and that about two-thirds of them had consented to and advised the borrowing of the money for the purposes named. It meets the objection coming from the holders of the first mortgage bonds by saying:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensible to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts, of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care."

In the case of the Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S., 434, the order appointing the receiver was broad and comprehensive, and also explicit in the character of liabilities the receiver was authorized to incur, and the character of demands he was authorized to pay as preferential to the lien of the mortgage. An objection was made to the receiver giving such preferences. The court held, in most instances, after examining each, that the claims came within the

rule laid down in the order of appointment. It followed the rule laid down in Wallace v. Loomis, 97 U. S., 146, that the court, in order to preserve a railroad coming under its custody, had the power to authorize necessary repairs, the purchase of necessary rolling stock, and to complete an unfinished portion of the line, making the cost a superior claim; and also followed the rule laid down in Miltenberger v. Logansport Ry. Co., *supra*, that such power extends to providing for operating expenses and freight balances. There is no extension of the doctrine beyond the two earlier cases. It will be observed that no allusion in any of the three cases is made to a claim arising in tort or springing out of negligence on account of which the railroad companies became liable. In each of these cases the claims were subjected to a critical and severe test, and unless they came under the rule, no difference how meritorious on the part of the claimant or beneficial to the corporation, they were disallowed.

The rule in Fosdick v. Schall, *supra*, is made even more conspicuous in the case of Huidekoper v. Locomotive Works, decided at the same time (99 U. S., 258), in which the Supreme Court reverses the ruling of the lower court allowing the owner of rolling stock, under similar circumstances, a preferential claim for what the Circuit Court ascertained to be an equitable allowance for the use of and repairs to its locomotives while operated by the railroad company.

Commenting upon these cases, in Burnham v. Bowen, 111 U. S., 776, the court says:

"We do not now hold, any more than we did in Fosdick v. Schall, or Huidekoper v. Locomotive Works, 99

U. S., 258, 260, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."—P. 783.

In the case of Kneeland v. American Loan Co., 136 U. S., 89, a railroad, with its rolling stock, was placed in the hands of a receiver at the instance of a creditor. He, among others, rented rolling stock leased to the company with a right of purchase, and there being a deficit in the running of the road by the receiver the rental for such rolling stock was not paid. The lessor took possession of his stock and made a claim for rent, to have priority over the creditors on the foreclosure of the mortgage and the sale of the road under such foreclosure. The Supreme Court denied this claim, and in the course of the decision says:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some

courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage upon a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this Court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

See, also, Morgan's Company v. Texas Central Ry. Co., 137 U. S., 171, 198, 199, and Thomas v. Western Car Co., 149 U. S., 95, 111.

In the last case, after citing the above quoted language from Kneeland v. American Loan Company, with approval, the court says:

"The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and em-

ployes, or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."—Page 112.

A review of the foregoing cases must deeply impress one that aside from the limited class of cases enumerated as exceptions, the Supreme Court of the United States has sought to correct the impression that mortgages on railroads are of a less binding and obligatory character than mortgages executed by owners of other kinds of property, and have endeavored to leave the impression that the security of railroad mortgagees, aside from these limited exceptions, stands upon precisely the same basis as that of other mortgagees.

The person who furnishes means for the construction of a railroad no doubt has in one sense an equitable property in that construction, but his claim not coming within the limited category prescribed cannot displace the lien of an existing mortgage.

In Toledo &c. R. R. Co. v. Hamilton, 134 U. S., 296, where one Hamilton had erected a dock in the City of Toledo on the property of the Railroad Company, and as a part of its system, he applied to have his claim preferred over that of the mortgagee upon the trust fund in the hands of the receiver in a mortgage foreclosure suit. No question was made as to the amount due from the Railroad Company for the work he did nor as to the construction of the dock being an improvement of the railroad property. It was held in the lower court that his construction had gone into the improvement and

building up of the mortgage security and gave an equitable priority of payment analagous to that of a mechanic's lien. The Supreme Court in denying this claim, says:

"The record imparted notice to Hamilton, and to all others, of the facts and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can three years after creating by recorded mortgage an express lien upon its property, by contract with a third party displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate, no one would have the hardihood to contend that it could be done; and there is in this respect no difference between ordinary real estate and railroad property."

TORT LIABILITIES ARE NOT OPERATING EXPENSES.

Why should one who has no contract claim whatever, be preferred? Why should he, the basis of whose claim rests upon the culpable negligence of the agents of the corporation ask to have the obligation of a contract violated and destroyed in order that such a claim should be preferred? In no other marshaling of claims either against individuals or against corporations could he successfully assert priority. His demand is of a lower standing in the forum of morality than that of a simple contract obligation, and could not in legal tribunals rank with an unsecured contract obligation—until it had been reduced to judgment. It seems to us unsound to argue that accidents and injuries must occur in the

operation of a railroad, and therefore the liability to pay for such injuries becomes an operating expense,—that no railroad system can be conducted without incurring such liabilities, and therefore they are the necessary incidents to operation, and must be given preference over specific liens. The premise is not correct. The law does contemplate that railroads can be conducted without such injuries happening. If they are casualties and mere accidents, and cannot be guarded against, a railroad company is not liable for them. Such injuries the law looks upon as inevitable, and being inevitable, grants immunity from liability. But beyond this line the law regards the act or omission which caused the injury, preventable, and its omission or commission inexcusable. It is because it is preventable, and since the existence of the cause producing the injury is preventable, the law holds the corporation financially responsible for it. Therefore, instead of dealing with the carelessness of the agents and operatives of railroad companies, which occasions such injuries, as inevitable, the law conclusively, on the contrary, presumes them preventable, and that the observance of reasonable care and precaution will prevent them. Thus, in the nature of things, the only line of distinction known to the law is the injury which reasonable skill and foresight cannot guard against, and that which reasonable diligence and precaution will prevent. The carelessness that gives rise to liability is not a part of the operation of the road, but is a departure from it. As stated by the courts, such misfeasance or nonfeasance does not tend to keep the road in operation, but on the contrary tends to prevent it being operated, and if repeated a sufficient

number of times would be destructive of its operation. To allow a claim thus arising to displace the mortgage lien would in effect be to make the mortgage bondholders of a railroad company guarantors of every person dealing with it, either as passengers, operatives or otherwise, to the full extent of the mortgage security. Without the power of employing or discharging, they would assume all the responsibilities of the principal to the extent of the security. Such a rule, instead of tending to keep the railroad a going concern would tend to prevent its being an existing concern. It would place a person having a mere claim to unliquidated damages not only on a higher plane of protection than the general contract creditor of the railroad company, but also above that creditor who furnished the means for the construction of the road and who had in addition taken a mortgage upon its properties as a specific security.

We respectfully submit that neither upon the precedents of the adjudged cases nor upon principle can such a doctrine be maintained.

Respectfully submitted,

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